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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CONNIESUE DICKINSON,

Plaintiff and Appellant,

v.

OJARS LEJINS et al.,

Defendants and Respondents.

D038748

(Super. Ct. No. GIN002612)

APPEAL from an order of the Superior Court of San Diego County, Michael M. Anello, Judge. Affirmed.

ConnieSue Dickinson brought a breach of contract and tort action against defendants Ojars and Deborah Lejins, but she dismissed the complaint before trial. The court awarded the Lejinses attorney fees of \$24,674.50 as the prevailing parties under Civil Code section 1717 (section 1717). Dickinson contends the court erred in awarding the attorney fees because the Lejinses failed to engage in mediation as required by the parties' contract. We reject this argument and affirm.

FACTS

The Lejinses sold their home to Dickinson. As part of the sale, the parties signed a standard form real estate purchase agreement (Agreement). The Agreement provided for the award of reasonable attorney fees to the prevailing party "[i]n any action . . . arising out of the Agreement . . . except as provided in paragraph 21A." Paragraph 21A provided that the parties agreed to mediate all disputes arising out of the Agreement, and "[i]f any party commences an action . . . without first attempting to resolve the matter through mediation, then that party shall not be entitled to recover attorney's fees"

After Dickinson took possession of the house, she discovered various problems that she claimed were not disclosed to her by the Lejinses. Dickinson made several attempts to initiate mediation in an attempt to resolve the dispute, but the Lejinses were not willing to engage in mediation. Consequently, Dickinson filed a lawsuit against the Lejinses.

Dickinson's complaint alleged causes of action for breach of contract and negligent and intentional failure to disclose material defects. Before trial, Dickinson filed a request for dismissal without prejudice. Thereafter, the Lejinses filed a cost memorandum, and requested attorney fees under section 1717. Dickinson opposed the request, arguing the Lejinses waived their right to recover attorney fees by refusing to engage in mediation instigated by her. The court found the Lejinses were the prevailing parties, rejected Dickinson's argument, and awarded the Lejinses attorney fees of \$24,674.50.

DISCUSSION

Attorney fees are not recoverable unless expressly authorized by statute or contract. (Code Civ. Proc., § 1021.) Section 1717 governs recovery of attorney fees under a contractual provision. The code section states a party prevailing on a contract that contains an attorney fees provision "shall be entitled to reasonable attorney's fees" and defines a "prevailing party" as "the party who recovered a greater relief in the action on the contract." (§ 1717, subds. (a), (b)(1).)

On appeal, Dickinson does not challenge the trial court's finding that the Lejinses were the prevailing parties, or that the action was "on the contract." (§ 1717, subd. (a).) Dickinson instead contends the trial court erred in rejecting her argument that the Lejinses waived their right to recover attorney fees by refusing to engage in prelitigation mediation. She relies on the contractual provisions relating to attorney fees and mediation.

The Agreement's attorney fees provision specifically provides that the prevailing "Buyer or Seller" is entitled to reasonable attorney fees "except as provided in paragraph 21A." Paragraph 21A, the mediation provision, states: *"If any party commences an action based on a dispute or claim to which this paragraph applies, without first attempting to resolve the matter through mediation, then that party shall not be entitled to recover attorney's fees, even if they would otherwise be available to that party in any such action."* (Italics added.)

In construing these provisions, we are required "to give effect to the plain and ordinary meaning of the language used by the parties." (*Coast Plaza Doctors Hospital v.*

Blue Cross of California (2000) 83 Cal.App.4th 677, 684.) Applying this principle, we conclude the Agreement permits the Lejinses to recover attorney fees even though they failed to participate in mediation. The Agreement expressly provides that only "that party" who "commence[d]" the action without first engaging in mediation is subject to the penalty of forfeiting the right to attorney fees. Because the Lejinses were not the parties who commenced the action, the contractual exception to attorney fees does not apply to preclude their right to recover fees.

The Sixth District Court of Appeal recently reached the same conclusion in interpreting an identical provision of a real estate sales contract: "[the defendant's] failure to [engage in mediation] . . . is irrelevant to the attorney fee provisions of the parties' real estate purchase agreement. Seeking mediation is a condition precedent to the recovery of attorney fees *by the party who initiates the action.*" (See *Johnson v. Siegel* (2000) 84 Cal.App.4th 1087, 1101, original italics.) Dickinson argues *Johnson* is inapposite because the plaintiff in that case made no attempt to participate in mediation. Despite this factual difference, the legal issue in that case was the same—a prevailing defendant's right to recover attorney fees—and the *Johnson* court's general discussion of the mutuality concept is fully applicable here.

Dickinson alternatively argues that an interpretation of the Agreement to provide that the failure-to-mediate penalty applies only to the party initiating the litigation is not proper under section 1717's mutuality provisions. We disagree.

Under section 1717's mutuality principles, courts must interpret attorney fees provisions to mean that each party to a contract must have the same rights with respect to

the recovery of attorney fees. (See *Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.) Thus, if the contract provides that only a prevailing defendant may recover attorney fees, the courts must interpret this provision as extending this right to a prevailing plaintiff. (*Ibid.*) Our interpretation of the Agreement is fully consistent with this principle—*each* party is entitled to recover attorney fees unless the party failed to participate in mediation and then files a lawsuit. "The provision is mutual and reciprocal because it would apply equally to either party." (*Johnson v. Siegel, supra*, 84 Cal.App.4th at pp. 1100-1101.) In this case, both parties—buyer and seller—were subject to a penalty if the party filed a lawsuit without first engaging in mediation. Similarly, both parties were not subject to the penalty if they prevailed in the action as a defendant, regardless whether they engaged in prelitigation mediation. Thus, the right to attorney fees is reciprocal.

Dickinson's argument that our interpretation of the contract would not "advance[]" public policy in favor of mediation is unavailing. While we recognize the strong public policy favoring alternative dispute resolution, we cannot rewrite the parties' contract. Our role is to enforce the contract as written. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) If the parties had wanted to enter into a contract prohibiting the defendant from recovering fees in a situation such as here, they were certainly entitled to do so. Further, to the extent Dickinson believes the law should mandate that both a plaintiff and defendant participate in mediation efforts before either party is entitled to obtain contractual attorney fees, this argument should be made to the Legislature, not the courts.

DISPOSITION

Order affirmed. Dickinson to bear costs on appeal.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McCONNELL, J.